YB DATO' HJ HUSAM HJ MUSA v. MOHD FAISAL ROHBAN AHMAD

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
MOHAMAD ARIFF YUSOF JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: D-02-1859-08-2012]
12 JANUARY 2015

EVIDENCE: *Exhibits – Admissibility of – Evidence accepted as relevant by court – Marked as exhibit without objection by defendant – Whether court could subsequently exclude exhibit – Evidence Act 1950, ss. 114, 167 – Courts of Judicature Act 1964, s. 69*

TORT: *Defamation – Libel – Evidence – Whether liability attached once defamation established by evidence – Whether defence of mere denial acceptable – Offences relating to cyber crime – Whether s. 114A Evidence Act 1950 applicable*

The plaintiff ('appellant'), a well known politician, commenced a defamation suit against the defendant ('respondent') alleging that the respondent was a blogger and had circulated an article titled '*Husam dan Tamrin Balun Balak 15 Juta*' *via* blogspot 'ruangbicarafaisal.blogspot.com'. The respondent however, denied writing the article and owning the said blogspot. The trial judge, having found the article to be defamatory and referred to the appellant, nevertheless held that the appellant did not establish that the respondent was the writer in the blog without considering s. 114A of the Evidence Act 1950 ('the Act') and dismissed the suit. Hence, the appellant's appeal. It was the appellant's submission that (i) the trial judge had marked the appellant's documentary evidence as exhibit without objection from the respondent and subsequently resiled from the position and refused to consider some of the marked exhibits on the grounds of hearsay; and (ii) the trial judge had failed to consider that the respondent's defence was a mere denial and no particulars were given in the statement of defence to support his defence of denial, more so when the respondent was not relying on the statutory defence and/or common law defence, and that the new provision of s. 114A of the Act assisted the appellant.

Held (allowing appeal with costs; setting aside order of High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) As a general rule in a defamation suit relating to libel, once the plaintiff has established by direct and/or circumstantial evidence through documents that the act complained of is defamatory, and was published and it refers to the plaintiff, and the defendant was the author of the misconduct, liability is attached. The defendant's defence cannot survive on mere denial, and when it relates to cyber crime, s. 114A of the Act will assist the plaintiff to force the defendant to exonerate himself from liability. (para 4)

(2) In civil cases, once the court decides that the evidence is relevant and have allowed the exhibits to be marked as exhibit with no objection by the respondent, it cannot be subsequently expunged on the ground that it has failed the admissibility test unless it has been marked as ID only for the purpose to determine admissibility. (paras 10 & 11)

(3) The judge, in the instant case, had accepted the evidence as relevant and admitted it and marked it as exhibit and subsequently, in the judgment, refused to consider the evidence, in consequence of lack of satisfaction on the admissibility procedure employed by the appellant. The judge could not do that. Once it is marked as exhibit, the court in deliberating the fact can give low probative value, but cannot exclude. The only court which in civil cases can consider the evidence or accept a document as an exhibit in a limited sense is the appellate court under s. 167 of the Act or the Court of Appeal pursuant to s. 69 of the Courts of Judicature Act 1964. (para 12)

(4) The court, under s. 114 of the Act, is obliged to consider all the evidence tendered in totality. However, there was failure of proper judicial appreciation of the issues relating to s. 114 making the judgment perverse. The respondent had also failed to rebut the presumption under s. 114A and the defence of mere denial was not acceptable as the identity had been established on the balance of probabilities, and in a defamation suit, it need not be on beyond reasonable doubt. (paras 24-26)

(5) The trial judge had misdirected himself and had not directed his mind to the relevant issues and had not acted in accordance with the law. Further, the decision did not pass the acid test of reasonableness. There were serious errors of law and misdirection on the face of the record and the judgment per se is perverse and ought to be set aside. (paras 24 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif ('perayu'), seorang ahli politik yang dikenali ramai, memulakan guaman fitnah terhadap defendan ('responden') dengan dakwaan bahawa responden adalah penulis blog dan telah mengedarkan satu artikel bertajuk '*Husam dan Tamrin Balun Balak 15 Juta*' melalui blogspot 'ruangbicarafaisal.blogspot.com'. Responden walau bagaimanapun, menafikan menulis artikel dan memiliki blogspot tersebut. Hakim bicara, setelah mendapati artikel tersebut memfitnah dan merujuk kepada perayu, masih memutuskan bahawa perayu tidak membuktikan bahawa responden adalah penulis dalam blog tersebut tanpa mempertimbangkan s. 114A Akta Keterangan 1950 ('Akta') dan menolak guaman tersebut. Dengan itu, perayu merayu. Hujahan-hujahan yang dibangkitkan oleh perayu adalah bahawa (i) hakim bicara telah menandakan keterangan dokumentar perayu sebagai ekshibit tanpa bantahan daripada responden dan kemudiannya menarik balik daripada kedudukan tersebut dan enggan mempertimbangkan beberapa ekshibit yang ditandakan atas alasan dengar cakap; dan (ii) hakim bicara telah gagal untuk mempertimbangkan bahawa pembelaan responden adalah hanya penafian

A semata-mata dan tiada butiran diberikan dalam penyataan pembelaan untuk menyokong pembelaan penafian, lebih-lebih lagi apabila responden tidak menyandar atas pembelaan statutori dan/atau pembelaan common law, dan bahawa peruntukan baru s. 114A Akta membantu perayu.

B **Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)**
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

C **(1)** Sebagai undang-undang am dalam guaman fitnah berkaitan dengan libel, liabiliti wujud sebaik sahaja plaintif telah membuktikan melalui keterangan langsung dan/atau ikut keadaan melalui dokumen-dokumen bahawa tindakan yang diadukan adalah memfitnah, diterbitkan dan merujuk kepada plaintif, dan bahawa defendan adalah pelaku salah tersebut. Pembelaan defendan tidak boleh bertahan atas penafian semata-mata, dan apabila ia melibatkan jenayah siber, s. 114A Akta
D akan membantu plaintif untuk memaksa defendan melepaskan dirinya daripada liabiliti.

(2) Dalam kes-kes sivil, sebaik sahaja mahkamah memutuskan bahawa keterangan adalah relevan dan telah membenarkan ekshibit-ekshibit ditandakan sebagai ekshibit tanpa bantahan daripada responden, ia tidak
E boleh kemudiannya dipotong atas alasan bahawa ia telah gagal dalam ujian penerimaan masuk kecuali ia telah ditandakan sebagai ID hanya untuk tujuan menentukan kebolehterimaan.

(3) Hakim, dalam kes ini, telah menerima keterangan tersebut sebagai
F relevan dan menerima masuk dan menandakannya sebagai ekshibit dan kemudiannya, dalam penghakiman, enggan mempertimbangkan keterangan tersebut, kerana tidak berpuashati dengan prosedur kebolehterimaan yang dituruti oleh perayu. Hakim tidak boleh berbuat demikian. Sebaik sahaja ditandakan sebagai ekshibit, mahkamah dalam
G mempertimbangkan fakta boleh memberikan nilai probatif yang kurang, tetapi tidak boleh mengecualikan. Satu-satunya mahkamah dalam kes sivil yang boleh mempertimbangkan keterangan atau menerima sesuatu dokumen sebagai ekshibit dalam keadaan terhad adalah mahkamah peringkat rayuan di bawah s. 167 Akta atau Mahkamah Rayuan menurut s. 69 Akta Mahkamah Kehakiman 1964.

H **(4)** Mahkamah, di bawah s. 114 Akta, adalah bertanggungjawab untuk mempertimbangkan kesemua keterangan yang dikemukakan secara keseluruhannya. Walau bagaimanapun, terdapat kegagalan pertimbangan kehakiman yang wajar bagi isu-isu yang berkaitan dengan
I s. 114 yang menjadikan penghakiman tersebut bercanggah. Responden juga telah gagal mematahkan anggapan di bawah s. 114A dan keterangan penafian semata-mata tidak boleh diterima kerana identiti telah dibuktikan atas imbangan kebarangkalian, dan dalam guaman fitnah, ia tidak perlu melampaui keraguan munasabah.

(5) Hakim bicara telah tersalah arah dan telah tidak mengarahkan perhatiannya kepada isu-isu yang relevan dan tidak bertindak menurut undang-undang. Keputusan tersebut juga tidak melepasi ujian kemunasabahan. Terdapat kekhilafan undang-undang yang serius dan salah arah jelas atas rekod dan penghakiman itu sendiri adalah bercanggah dan wajar diketepikan.

Case(s) referred to:
Chew Peng Cheng v. Anthony Teo Gin [2008] 8 CLJ 418 HC ***(refd)***
Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd [2012] 1 LNS 994 HC ***(refd)***
Liang Weng Heng v. PP [2014] 5 CLJ 401 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69
Evidence Act 1950, ss. 5, 73A, 73AA, 90A, 114(g), (h), 114A, 136, 167

Other source(s) referred to:
Janab's Key to the Law of Evidence (2014), pp 224, 226

For the appellant - Hisham Fauzi (Ahmad Mustaqim Zaki, GB Rueben Netto & Gurbachan Singh with him); M/s Hisham Fauzi & Assocs
For the respondents - Adzly Ab Manas (Sallehuddin Bajuri with him); M/s Adzly & Co

[Editor's note: Appeal from High Court, Kota Bharu; Civil Suit No: 23-1-2010 (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's appeal against the decision of the learned High Court Judge dismissing the defamation suit (on liability) came up for hearing on 5 March 2014 and upon hearing we allowed the appeal and set aside the judgment and remitted the case for assessment of damages before the High Court. My learned brothers Azahar bin Mohamed JCA and Mohamad Ariff bin Md Yusof JCA have read the draft judgment and approved the same. This is our judgment.

[2] The Memorandum of Appeal reads as follows:

(1) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tuntutan perayu/plaintif ditolak dengan kos.

(2) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa pihak perayu telah gagal membuktikan bahawa responden/defendan adalah penulis dan pemilik bagi "ruangbicarafaisal.blogspot.com" tersebut walaupun plaintif telah mengemukakan dokumen-dokumen seperti eks. P2 (Third Party Search), dan eks. P6 (artikel yang bertajuk "Mohon Maaf kepada Rakan Blogger" dari laman blog Ruang Bicara Faisal Rohban) yang menyokong dakwaan perayu/plaintif bahawa responden/defendan

adalah pemilik blogspot ruangbicarafaisal.blogspot.com. dan juga turut disokong melalui keterangan SP2 (Penyerah Saman) dan juga SP3 (Doktor yang merawat ayah responden/defendan).

(3) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira berdasarkan bukti-bukti yang telah dikemukakan berserta keterangan melalui saksi-saksi, perayu plaintif, telah berjaya membuktikan kes perayu/plaintif (Burden Of Proof) di atas imbangan kebarangkalian (Balance of Probabilities) dan beban pembuktian (onus of proof) telah bertukar kepada pihak responden/defendan namun responden/defendan telah gagal untuk membuktikan kes beliau.

(4) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira fakta bahawa responden/defendan telah gagal untuk memanggil adik responden/defendan untuk membuktikan bahawa no. telefon yang digunakan untuk perayu/plaintiff adalah bukan nombor telefon kepunyaan responden/defendan mahupun adik reponden/defendan dan seterusnya membuktikan bahawa tiada sebarang komunikasi yang telah berlaku di antara plaintif/perayu dengan responden/defendan seterusnya s. 114(g) Akta Keterangan 1950 tidak terpakai terhadap responden/defendan.

(5) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa pemilikan ke atas suatu blog hanya boleh ditentukan/sahkan melalui operator blogspot.com atau memanggil pihak yang berkuasa seperti Suruhanjaya Komunikasi dan Multimedia Malaysia tanpa mengambil kira keterangan-keterangan ikut keadaan (Circumstantial Evidence) seperti mana yang dikemukakan oleh perayu/plaintif semasa perbicaraan.

(6) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa eks. P2 adalah suatu keterangan yang tidak boleh diterimapakai (inadmissible) tanpa mengambil kira bahawa responden/defendan telah mengakui bahawa kandungan di dalam eks. P2 tersebut adalah tepat dan betul.

(7) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa keterangan yang dibuat oleh saksi perayu/plaintif SP2 (Penghantar Saman) tidak selamat untuk diterima secara benar tanpa mengambil kira fakta bahawa SP2 adalah merupakan saksi bebas di dalam kes ini dan beliau merupakan saksi yang kredibel dan keterangan beliau adalah inherently probable berbanding keterangan defendan/responden.

(8) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira keterangan SP2 semasa pemeriksaan balas telah mengakui bahawa gambar eks. P3 (a) diambil melalui blog defendan yang sama dengan gambar di eks. P4 yang hanya untuk tujuan pengecaman defendan/responden.

(9) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa SP2 adalah seorang saksi yang tidak 'reliable' dan tidak boleh dipercayai kerana sanggup melakukan

'tampering' ke atas dokumen tanpa mengambil kira fakta bahawa semasa pemeriksaan balas SP2 telah mengakui bahawa gambar eks. P3 (a) telah diambil melalui blog defendan yang digunakan oleh SP2 untuk tujuan pengecaman sahaja bagi memudahkan utusan serahan saman terhadap responden/defendan.

(10) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira semangat dan tujuan penggubalan dan penambahan s. 114A Akta Keterangan 1950 (Spirit and Purpose of the Inclusion of s. 114A of Evidence Act 1950) semasa memutuskan kes ini pada 17 Julai 2012 walhal s. 114A telah digubal pada waktu penghakiman tersebut direkodkan dan dikuatkuasakan pada 31 Julai 2012.

Preliminaries

[3] The central issue and complaint of the appellant in this case in essence is that (i) the learned judge had marked the plaintiff's documentary evidence as exhibit with no objection from the defendant and subsequently in the judgment resiled from the position and refused to consider some of the marked exhibits on the grounds of hearsay without giving any notice or opportunity to the plaintiff, thereby committing error of law as well as misdirection on the law which has resulted in procedural unfairness of grave nature which has prejudiced the plaintiff's case and lead to an erroneous conclusion; (ii) the learned judge failed to consider that the defendant's defence was a mere denial and no particulars were given in the statement of defence to support his defence of denial, more so when the defendant was not relying on the statutory defence and/or common law defence, and the new provision of s. 114A of Evidence Act 1950 ('EA 1950') assists the plaintiff.

[4] As a general rule in defamation suit relating to libel, once the plaintiff has established by direct and/or circumstantial evidence through documents that the act complained is defamatory, and was published, and it refers to the plaintiff, and the defendant was the author of the misconduct, liability is attached, and the defendant's defence cannot survive on mere denial, and when it relates to cyber crime, s. 114A EA 1950 will assist the plaintiff to force the defendant to exonerate himself from liability.

[5] We do not wish to dwell on the statutory and common law defences of defamation as it has been well articulated by Hamid Sultan JC in the case of *Chew Peng Cheng v. Anthony Teo Gin* [2008] 8 CLJ 418, as the instant case relates to a mere denial where no statutory or common law defence has been raised. This case is also not concerned whether the plaintiff has proved the element of defamation but whether it was correct in law to accept the plaintiff's evidence and exhibits at the stage of plaintiff's case with the consent of the defendant and subsequently reject without giving notice to the plaintiff, some of the exhibits which is the foundation and/or has nexus to the plaintiff's case and is a relevant evidence pursuant to s. 5 of the EA 1950, which states:

A 5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[6] It must be noted that the EA 1950 is in essence a departure to a large extent of exclusionary rules at common law and it takes an inclusive B approach discarding the common law rules of hearsay, etc; and giving wide powers to court to admit evidence and/or document if it is relevant and not because it offends any exclusionary rules with a small opening (in practice) in civil cases and rules of procedure by the agreement of parties to allow whatever documents the parties have agreed to be relevant to the subject C matter of the suit. It is a cardinal rule of evidence at common law that:

(a) Evidence must be confined to matters in issue;

(b) Hearsay evidence is not admissible;

(c) In all cases only the best evidence must be given;

D

(d) The burden of proof generally rests on the person who positively asserts the facts.

[7] The cardinal rule of the common law has been excluded or whittled down not only by the original Evidence Act 1950 but also through a list of E amendments after independence to reach a fair and balanced result and to meet with modern challenges in civil and criminal litigation to attain justice. (See ss. 73A, 73AA, 90A of EA 1950).

[8] It must also be noted that rules of evidence is not only dependant on the EA 1950 but also other Act or rules and the application of this principle F is often cross checked by the courts by looking at the common law principles and cases to ensure and to achieve a fair result. When the Act is silent on its applicability, etc; the court's role is captured in s. 136 of EA 1950 which reads as follows:

136. (1) When either party proposes to give evidence of any fact, the G court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is H admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit I evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

[9] Parliament has entrusted the court the role of deciding what is relevant and the discretion for the court to allow the relevant evidence to be admissible. Just because the evidence is relevant does not mean it is admissible as of right. It is usually the case but not necessarily. The jurisprudence is captured in *Janab's Key to the Law of Evidence* (2014) at pp. 224 and 226 as follows:

> It is trite that relevancy *per se* is not the passport to admissibility. Courts often guards jealously evidence which has the characteristics of hearsay elements or opinion evidence to be admitted if its prejudicial effect will compromise the integrity of the decision making process itself.
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> Evidence obtained during course of trial is also admissible. Courts have also asserted that the rules governing admissibility of evidence are procedural in nature and not a substantive right. Being procedural in nature the ruling of court during trial on evidential issue will not be a subject matter of appeal without the completion of the trial itself. In addition, courts at appellate stage have jurisdiction and power to expunge inadmissible evidence and/or correct procedural ruling.
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> What are relevant facts have been defined in s. 3. Relevant facts are those facts which render probable or improbable the existence or nonexistence of the fact in issue, because they are connected with the fact in issue. According to s. 5 only two kinds of facts may be proved. They are facts in issue and relevant facts. What facts are relevant, are set out in ss. 6 and 55. The object of the section is to ensure that irrelevant and unconnected evidence is prohibited from being given in a judicial proceeding so that the court's time is saved and miscarriage of justice is avoided. Facts relevant to the issue have been arranged in the Act in the following order:
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> (a) Things connected with the facts in issue as part of the same transaction, occasion, cause effect, motive or conduct, etc;
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> (b) Admission and confession;
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> (c) Statements of persons who cannot be called as witness;
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> (d) Statements made under special circumstances;
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> (e) Relevancy of judgment;
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> (f) Opinion evidence; and
>
> (g) Character evidence.

[10] Even though relevancy is one of law it is no easy task for trial court to rule on the subject on hotly contested facts as s. 5 places the task on the courts to deal with various concepts (as well as difficult concepts) like *res gestae*, hearsay evidence, dying declaration, admission, confession, opinion evidence, character evidence, similar fact, evidence, etc. It has to be taken by at least a three-step approach. First stage, the court must *prima facie* consider whether the fact is relevant. This is more of a common sense approach taken by any person with the most basic legal qualification. The second stage is whether by saying it as relevant, related provisions of the Act

A are infringed; or to put it in another way whether the person introducing the fact has satisfied the criteria of the Act. If he does not satisfy the criteria that evidence is not relevant. Once this two stage procedure has been satisfactorily dealt with, then the third stage is the admissibility stage which is procedural in nature. Here the court has to look at whether the litigant has satisfied the B rules of admissibility. If the litigant has not, the relevant evidence can be rejected, for example, not producing the original document or satisfying the criteria for introducing secondary evidence. In civil cases, once the court decides that the evidence is relevant and have allowed the exhibits to be marked as exhibit with no objection by the respondent, it cannot be C subsequently expunged on the ground that it has failed the admissibility test unless it has been marked as ID only for purpose to determine admissibility.

[11] However, if the relevancy and/or admissibility has been challenged throughout the trial, the court may deal with the issue at the end of the trial marking it first as ID and subsequently as exhibit. There is no discretion D vested in the trial court to exclude relevant and admissible evidence marked as exhibit and/or ID or whatever label it may have been given, that too when there was no objection taken by the parties when the exhibit or ID is marked. This is not the position in criminal cases. In criminal cases, the court has wide discretion to exclude relevant and admissible evidence under the E fairness rule. This jurisprudence has been captured in the case of *Liang Weng Heng v. PP* [2014] 5 CLJ 401, where the quorum consisted of Azahar bin Mohamed, Mohtarudin bin Baki and Hamid Sultan bin Abu Backer, and we do not wish to repeat the same.

[12] In the instant case, the complaint of the appellant is that the learned F judge had accepted the evidence as relevant and admitted it and marked as exhibit and subsequently in the judgment refused to consider the evidence, in consequence of lack of satisfaction on the admissibility procedure employed by the appellant. That the learned trial judge cannot do. Once it is marked as exhibit, the court in deliberating that fact can give low probative G value but cannot exclude. The only court which in civil case can consider the evidence or accept a document as an exhibit in a limited sense is the Appellate Court under s. 167 of EA 1950 or if it is Court of Appeal also pursuant to s. 69 Courts of Judicature Act 1964 which reads as follows:

> 167. The improper admission or rejection of evidence shall not be ground H of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

I And s. 69 of the Courts of Judicature Act ('CJA')1964:

> 69. (1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together

with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. A

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought. B

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires. C

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision. D

[13] It is also a must in the event the exhibit is marked as ID only or if the evidence is by way of statement or oral evidence, it must form part of the appeal record as of right as s. 167 of EA 1950 as well as s. 69 CJA 1964 makes it mandatory for the Appellate Court to revisit the issue if necessary. E

Brief Facts

[14] The plaintiff is a well known PAS politician. The defamation suit alleges that the defendant is a blogger and circulated an article titled "Husam Dan Tamrin Balun Balak 15 Juta" *via* blogspot 'ruangbicarafaisal.blogspot.com' on 3 October 2009. The defendant denies writing the article and owning the said blogspot. F

[15] The learned trial judge had found the article to be defamatory and it referred to the plaintiff but says the plaintiff did not establish that defendant is the writer in the blog without considering s. 114A of the EA 1950. The relevant finding of the learned judge as to the issue of liability reads as follows: G

16. (iii) Saya mendapati bahawa kandungan artikel tersebut adalah palsu, tidak benar dan memfitnah beliau di mana ianya jika dibaca secara objektif akan memberikan gambaran/maksud bahawa plaintif adalah seorang pemimpin yang korup (corrupt), tidak jujur, tamak, hipokrit dan yang telah menyalahgunakan kuasa dan kedudukan dalam Kerajaan Negeri Kelantan untuk kepentingan peribadi beliau. H

18. Persoalan seterusnya yang relevan dan lebih penting ialah adakah defendan pemilik blog tersebut? Berdasarkan kepada keterangan yang dikemukakan saya mendapati bahawa plaintif gagal membuktikan bahawa defendan adalah penulis blog tersebut. I

[16] In the instant case, three witnesses including the plaintiff gave evidence for the plaintiff and two for the defendant. The evidence of the plaintiff's second and third witnesses ('SP2' and 'SP3') and some of the documents tendered through them did not find favour with the learned judge. These two witness's evidence and documents tendered were crucial to establish the culpability of the defendant. The learned trial judge preferred to accept the bare denial defence and evidence of the defendant ('SD1') story as well as his witness SD2 who purportedly gave evidence on a subject matter of documents when both parties have agreed to be marked as exhibits. SD2 evidence in the instant case may have been relevant if the documents which SD2 attempted to discredit was at ID stage.

[17] In addition, the appellant complains that the learned judge has failed to consider or reject the appellant's evidence to show nexus to the defendant, which after much deliberation, we find has merits. That part of the submission of the appellant reads as follows:

> 6. The learned judge had failed to consider the following evidence tendered by the plaintiff and his witnesses in satisfying the balance of probability test:
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> (a) SP1's evidence of the defendant's communication (sms) with the plaintiff *via* handphone numbers 019-2708767 on 5 October 2009 and 012-3317211 on 7 October 2009 registered in the name of the defendant's sibling.
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> (b) SP3's entire evidence in relation to exhs. P6 and P7 ie, similarities and timing of the defendant's father operation/treatment at HRPZII ie, OA is dated 3 October 2009, P6 is dated 6 October 2009 and P8 confirm dated of admission on 27 September 2009.
>
> (c) Consider/sufficiently consider the difficulty in establishing cyber identity of bloggers and, therefore, one has to fall back on common law proof of the same by considering circumstantial evidence, such as the hand phone numbers and exhs. 3 to 8 tendered through SP2 and SP3 respectively.
>
> (d) The learned trial judge failure to sufficiently consider and evaluate the plaintiff's witnesses' evidence in the light of contemporaneous documents (exhs. 2 to 8 and hand phone numbers 019-2708767 and 012-3317211) in failing to hold that the plaintiff had satisfied both the legal and evidential burden of proof that the defendant was indeed the writer of the offending article.

[18] SP2 was a process server and through him the exhs. 'P2', 'P3 to P3AM' exh. 'P4' were marked. His evidence and documents without objection from the defendant links the defendant. SP3 was a doctor who links the defendant by virtue of treating his father in the hospital and through him exh. 'P3' was marked. Again there was no objection and no request was made to mark the documents as ID by the defendant. All the said exhibits and the evidence of SP2 in actual fact stands as strong circumstantial evidence against

the defendant and the 'phone sms' gives added probative force to the plaintiff's claim. The learned trial judge on this issue relating to SP2 and SP3 evidence stated as follows:

> 6. (iii) Artikel tersebut diterbitkan dan disiarkan melalui blog RBF (ruangbicarafaisal.blogspot.com) sepertimana Ekshibit "P1". (Ikatan dokumen "B" di ms. 5-18).
>
> (iv) Plaintif mendakwa blog tersebut adalah milik defendan hasil siasatan yang beliau buat antara lain, melalui carian oleh rakan/kenalan beliau sepertimana Ekshibit "P2" (third party result).
>
> 7. Menurut SP2 beliau telah diarahkan oleh peguam Tetuan Hisham Fauzi untuk menyerahkan writ saman kes ini ke atas defendan. Untuk itu, beliau telah pergi ke rumah kediaman defendan di mana beliau berjumpa defendan pada sebelah malam dan dalam perjumpaan tersebut beliau telah merakamkan sejumlah 13 keping gambar-gambar defendan dan rumah kediaman beliau seperti Ekshibit "P3A" – "P3M". Menurut SP2 dalam pertemuan tersebut defendan telah dengan bangganya mengaku kepada SP2 bahawa beliau adalah pemilik blog tersebut. Selain itu menurut SP2 beliau telah memuat turun gambar defendan dari blog yang sama sepertimana Ekshibit "P4".
>
> 8. SP3 adalah Pakar Perubatan dan juga kenalan plaintif. Beliau telah mengemukakan rekod perubatan pesakit Rohban Ahmad itu bapa kepada defendan yang menunjukkan bahawa penama tersebut telah menjalani rawatan/pembedahan di Hospital Raja Perempuan Zainal II, Kota Bharu (HRPZ II) pada 6 Oktober 2009 sepertimana Ekshibit "P8".

[19] Exhibit P6 has much relevance to this case and the evidence of SP3 and the learned trial judge has captured that part of the evidence as follows:

> 9. Peguamcara yang terpelajar plaintif berhujah bahawa plaintif berjaya membuktikan bahawa defendan adalah pemilik blog tersebut dan bertanggungan ke atas artikel yang disiarkan di dalamnya. Plaintif berdasarkan antara lain, kepada keterangan ikut keadaan (circumstantial evidence) berikut:
>
> (i) Keunikan nama defendan di mana plaintif mendakwa nama "Rohban Ahmad" adalah satu nama yang amat unik dan jarang digunakan.
>
> (ii) Penulisan bertarikh 6 Oktober 2009 (eks. "P6") dimana dalam blog yang sama penulis (defendan) memberitahu kepada rakan-rakan 'bloggers' beliau bahawa pada masa itu berada di Kota Bharu kerana menjaga bapa yang sedang mendapat rawatan di hospital di kampung beliau.
>
> (iii) Laporan perubatan (eks. "P8") dan keterangan SP3 di mana menurut SP3 mengesahkan seorang pesakit bernama Rohban Ahmad ada menjalani rawatan/pembedahan di HRPZ II pada masa yang sama sepertimana yang dinyatakan dalam artikel eks. "P6".

10. Selain itu, plaintif juga merujuk kepada keterangan SP2 iaitu, penghantar saman dan juga kenalan beliau yang mana menurut SP2 semasa penyerahan Writ Saman dilakukan, defendan telah dengan bangganya mengaku beliau adalah Faisal Rohban yang menulis dalam blog "ruangbicarafaisal".

[20] The learned trial judge has also documented the defendant's case as follows:

11. Berdasarkan kepada Pernyataan Pembelaan Dalam Pliding, defendan tidak bersandarkan kepada mana-mana pembelaan undang-undang yang diperuntukkan di bawah Akta Fitnah 1958. Keterangan pihak defendan dikemukakan melalui dua saksi iaitu, defendan sendiri (SD1) dan En. Mohd Fadzil Arsady, pakar IT (SD2).

12. Secara ringkasnya, keterangan defendan (SD1) adalah sebagaimana berikut:

(i) Defendan menafikan bahawa beliau adalah pemilik blog "ruangbicarafaisal.blogspot.com" tersebut. Beliau juga menafikan mempunyai kepentingan dan pengetahuan ke atas penulisan artikel tersebut.

(ii) Berhubung Ekshibit "P2" (third party result) yang dikemukakan oleh plaintif untuk mengaitkan beliau dengan blog tersebut, menurut defendan selain daripada nama, nombor kad pengenalan, jantina dan nombor kenderaan, ke semua butir-butir peribadi yang tercatat dalam dokumen adalah salah dan tidak tepat dan bukan berkaitan/merujuk kepada beliau.

13. Berhubung Ekshibit "P2" menurut SD2 ianya adalah merupakan satu dokumen yang dimuat turun dan dicetak dari "File F:/" computer seseorang dan bukannya dicetak terus dari internet. Menurut SD2 suatu dokumen yang disimpan dalam computer boleh dipinda/diubah oleh sesiapa sahaja yang membuka fail tersebut. Berhubung pemilikan suatu blog menurut SD2 ianya boleh ditubuhkan oleh sesiapa sahaja dan pemilik (blogger) tidak diperlukan untuk menggunakan nama sebenar bagi alamat blog beliau tersebut. Penulis/pemilik blog boleh menggunakan nama samaran atau pseudonym. Menurut SD2 hanya syarikat pengendali (operator) laman seb berkenaan sahaja yang dapat memberikan maklumat sahih pemilik suatu blog tersebut.

[21] The learned trial judge in saying that the plaintiff had not proved that the defendant is the blogger says:

Setelah menimbang keterangan yang dikemukakan oleh kedua-dua pihak, saya mendapati bahawa adalah tidak selamat untuk saya menerima keterangan pada Ekshibit "P2" tersebut sebagai keterangan di mahkamah.

[22] The learned trial judge also relies on s. 114(g) EA 1950 for not calling the maker of exh. P2 and also says s. 90A EA 1950 requirement was not satisfied. In addition, the learned trial judge says that the plaintiff failed to satisfy that the defendant was the person who wrote on the blog, and refused to accept the photograph exhs. as P3 as well as P4.

[23] The appellant also complains that the provision of 114A EA 1950 was not considered by the learned judge. On this point, the learned counsel for the appellant says:

> 1. When the amendment to s. 114 EA was first debated in Parliament, the Legislature had focused their attention on 'internet anonymity' where they said, "Pelbagai teknik boleh digunakan oleh penjenayah untuk menyembunyikan identity mereka dan ada kalanya mustahil untuk menentukan punca sebenar sesuatu emel atau data komunikasi elektronik yang lain".
>
> 2. In passing the bill, Parliament acknowledged the parameters of proof being on a balance of probability but much lower than the criminal standard required in establishing identity calling in aid the following presumptions. They were as follows:
>
> 2.1. If the name, photograph or pseudonym appeared in a publication, depicting said person to have some connection with the publication, said person was presumed to have published or re-published the contents of the publication;
>
> 2.2. If a publication originates from a network service that a person has registered, said person is presumed to have published or re-published the contents of the publication; or
>
> 2.3. If a publication originates from a computer which a person has custody or control of, said person is presumed to have published or re-published the contents of the publication.
>
> 3. It is submitted that the first presumption under s. 114A, impacts on the defendant in that his photographs (exhs. 3 to 4), the defendant's letter to his follows blogger (exh. P6) and OA linking the defendant to the blogspot (exh. 1) thereby invoking the presumption of publication and connection to the OA.
>
> 4. In light of the foregoing, there is a proper basis for arriving at a presumption as the connection between the evidence tendered and the presumption relied on is not too remote and uncertain. For this, it is wise to heed the words of Devlin LJ in *Berry v. British Transport Commission* [1962] 1 QB 306.

[24] We have read the appeal record, the submission of the parties in detail. After much consideration to the submission of the respondent, we take the view that there are serious errors of law and misdirection on the face of record and the judgment *per se* is perverse and ought to be set aside, and judgment on liability be entered in favour of the plaintiff with an order for assessment before the High Court. Our reasons *inter alia* are as follows:

(a) In the instant case, the learned judge's rejection of exh. P2 and failure to take into consideration the relevant exhibits for reasons stated earlier in the judgment is bad in law and must be seen as perverse.

(b) Invoking s. 114(g) EA 1950 in not calling the maker of exh. P2 is bad in law when the document has already been tendered and marked as exhibit. Once it is marked as exhibit, the application of s. 114(g) will not be applicable at all.

(c) Invoking s. 90A of EA 1950 after the exh. P2 has been marked is bad in law. Section 90A should have been applied before it is marked as exhibit. After having it marked and excluding it in evidence will lead to perverse judgment.

(d) The rejection of SP3 evidence on the face of record is perverse. In the instant case, SP3 evidence, exh. P8 and the article exh. P6 "Mohon Maaf Kepada Rakan Rakan Blogger" has nexus to link the blogger and his father. And also the telephone number of the blogger in his profile no. 019-2708767 is the same number as that of the defendant's younger brother, Fakhrul Rohban, which the defendant was using and from which the plaintiff has received a number of sms. Exhibit P6 reads as follows:

> Tuesday, October 6, 2009
>
> Mohon Maaf Kepada Rakan-rakan Blogger
>
> Terlebih dahulu saya memohon maaf kepada semua rakan-rakan blogger kerana tidak dapat turut serta bersama kalian di Bagan Pinang.
>
> Saya sekarang berada di kampung halaman kerana menjaga ayah yang sedang dirawat di Hospital. Hidupku sekarang siang di hospital, malam di hospital dan tidur pun di hospital.
>
> Sebelum ini beberapa kali ayah saya pernah dimasukkan ke hospital, tetapi kebiasaannya saya hanya pulang melawat hari sehari dua sahaja. Tetapi kali ini naluri saya merasa 'lain macam' sikit, kerana sakit ayah saya juga nampak 'lain macam' kali ini. Jadi, sebelum menyesal kemudian hari lebih baik saya luangkan masa cukup-cukup bersama ayahanda tercinta pada kali ini. Lagi pun saya anak yang sulong.
>
> Saya rasa amat terpanggil untuk menjaga beliau kali ini, tidak seperti sebelum ini. Apa pun hidup mati ditangan Allah SWT. Ayah saya telah selamat menjalani pembedahan kecil semalam. Cuma sakitnya masih terasa sehingga kini. Masih belum dapat berjalan lagi.
>
> Sudah hampir dua minggu saya meninggalkan kerja saya. Tapi, inilah pengorbanan kecil yang kita terpaksa bayar kepada ibu bapa kita. Pengorbanan yang kita lakukan ini kecil berbanding dengan apa yang telah dilakukan oleh ibu bapa terhadap kita selama ini.
>
> Setiap kali saya mengambil bekas apabila bapa saya hendak membuang air kecil, saya terus terbayangkan di zaman saya kanak-kanak dulu, apabila saya hendak ke tandas di tengah malam, ayahlah yang sering menemani saya. Pada waktu itu rumah saya

> tidak mempunyai tandas di dalam rumah. Tandas berada 100 meter dari rumah. Ayah dengan penuh kasih sayang dalam kesejukan malam mendukung saya ke tandas kerana bimbang pacat menggigit kaki saya. Begitulah kasih dan sayangnya seorang ayah kepada anaknya. Boleh kah kita semua membuat begitu kepada ibu bapa kita?
>
> Terima kasih saya ucapkan kepada rakan-rakan blogger yang menghubungi dan bertanya khabar tentang keadaan ayah saya. Keprihatinan kalian semua saya hargai. Ternyata anda semua mempunyai semangat setiakawan yang tinggi.

(e) The court under s. 114 EA 1950 is obliged to consider the evidence of SP2, SP3, the exhibits, in particular exh. 8 and exh. P2 inclusive of the sms, etc, in totality. Section 114 EA 1950 states:

> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

[25] There was failure of proper judicial appreciation on the above issues related to s. 114 EA 1950 making the judgment perverse.

[26] We have gone through the evidence repeatedly and we are satisfied that on the balance of probabilities, the plaintiff has made out a case against the defendant. The defendant in this case has also failed to rebut the presumption under s. 114A EA 1950 and the defence of mere denial is not acceptable on the facts of the case as identity has been established on the balance of probabilities; and in defamation suit it need not be on beyond reasonable doubt. Such a proposition is also consistent with s. 114(h) of EA 1950 which states:

> (h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him.

[27] We are satisfied that the learned trial judge had misdirected himself as averred in the memorandum of appeal. In the instant case, we are satisfied that the learned trial judge had not directed his mind to the relevant issues and had not acted in accordance with the law and the decision does not pass the acid test of reasonableness. (See *Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd* [2012] 1 LNS 994).

[28] For reasons stated above the appeal is allowed with cost of RM50,000 to the appellant here and below and the order of High Court is set aside and the matter be remitted to the High Court for assessment of damages. The deposit to be refunded to the appellant.